90-843

No. 90- .

In the

Supreme Court of the United States.

OCTOBER TERM, 1990.

JAMES L. PRATT, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

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Questions Presented.

I. Whether the district court has discretion in a criminal trial to excuse a defense-subpoenaed witness, who asserts his privilege against self-incrimination, without first conducting a particularized inquiry regarding the witness's blanket assertion of the privilege.

II. Whether the district court can base a determination that petitioner is a career offender under the sentencing guidelines, and thus drastically enhance his sentence, on petitioner's prior convictions for state misdemeanors which did not involve the use of a weapon, nor the infliction of serious injuries.

Parties Below.

The parties to the proceeding in the United States Court of Appeals for the First Circuit were those parties named in the caption of the case in this Court.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

Petitioner, James L. Pratt, Jr., respectfully requests that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-captioned proceeding on August 28, 1990.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is reported at 913 F.2d 982, entitled *United States* v. *Pratt*, and is reprinted in the appendix hereto at pp. A1-A21.

The United States District Court for the District of Massachusetts (Freedman, D.J.) did not write an opinion relevant to the issues raised in this petition. Portions of the transcript of trial proceedings relevant to the district court's decision excusing a witness summonsed by the defense, Walter Wheeler, from testifying, and appellant's objections thereto, are reproduced in the appendix at A22-A29, *infra*. The transcript of the sentencing proceedings relevant to the district court's determination the appellant was a career offender, and appellant's objections thereto, together with the district court's memorandum of sentencing hearing and report of statement of reasons are reproduced in the appendix at A32-A52, *infra*.

Jurisdiction.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

Statutes Involved.

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

United States Sentencing Guidelines, Section 4B1.1.

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

The Commentary to Section 4B1.1, which states, in pertinent part, the "crime of violence" is interpreted by the Sentencing Commission as:

> . . . murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery . . . Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition . . .

and which defines "felony conviction" as:

> a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.

Title 18, United States Code, Section 16, in pertinent part, which defines "crime of violence" as:

> (a) an offense that has an element the use, attempted use or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Statement of the Case.

The petitioner, James L. Pratt, Jr., was arrested on January 18, 1989, when he attempted to purchase a kilogram of cocaine from an undercover police officer, Luis Rodriguez. A co-defendant, Robert Noble, who accompanied Pratt in an automobile to the scene of the transaction, was also arrested.

The transaction was arranged, in large part, by a friend of Pratt, Walter Wheeler, who was acting as an undercover informant in exchange for leniency on pending state criminal charges. Wheeler initiated contact with Pratt by telephoning him to arrange an introduction of the parties. Wheeler participated in several more telephone conversations with Pratt, as well as a meeting between the parties, in furtherance of the proposed drug sale. Several of these telephone conversations, as well as the meeting, were secretly tape recorded by government agents.

A superceding indictment was returned charging Pratt and Noble with conspiracy to possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. Section 841(a)(1); all in violation of 21 U.S.C. Section 846. Trial commenced on July 25, 1989 (Freedman, D.J.) presiding.

In support of the charges, the Government presented testimony from Agent Rodriguez, and introduced various tape recordings of conversations occurring between Pratt and Wheeler, as well as conversations involving Rodriguez.

Pratt sought to raise the defense of entrapment. He summonsed Wheeler as a witness. Wheeler refused to answer any questions, claiming his constitutional right against self-incrimination. Wheeler apparently based his claim of privilege upon the pendency of state charges for which he had originally sought leniency. According to an affidavit filed by Wheeler in state court, state police were not living up to the terms of their agreement concerning the state charges.

Defense counsel attempted to ask Wheeler questions concerning the following: 1) Wheeler's providing Pratt $5000.00 from the Hampshire County District Attorney's Office in January 1989 to facilitate a prior purchase of narcotics; 2) the circumstances of Wheeler's first meeting with Pratt concerning this proposed drug transaction; 3) the contents of any conversations with Pratt concerning the proposed drug transaction; 4) the contents of any conversations with law enforcement officers regarding their investigation of Pratt; 5) what Wheeler hoped to gain by his cooperation; 6) Wheeler's participation in numerous meetings with law enforcement officers and his tape recording of Pratt's conversations; and, 7) whether Wheeler had supplied Pratt with cocaine, free of charge, at the behest of law enforcement officers during the investigation of this case. (See portions of trial transcript reproduced in the A22-A29).

Over objection of Pratt's counsel, the district court sustained Wheeler's assertion of the Fifth Amendment privilege to each of these questions, and excused Wheeler from testifying (see portion of trial transcript, A22-A29). The court did not make any particularized inquiry regarding Wheeler's blanket assertion of the privilege (A22-A29). Further, the court refused a

defense request to grant Wheeler witness immunity, and denied the defendant's motion to strike all of the tape recordings involving Wheeler, as well as the testimony of Officer Rodriguez stemming from the tape recordings (A22-A29). The court also precluded Pratt from raising the defense of entrapment, refusing to instruct the jury on entrapment because it found the evidence did not warrant such an instruction (A31-A32).

On August 1, 1989, the jury found Pratt guilty. The jury failed to reach a unanimous verdict as to Noble, and a mistrial was declared on his case.

On September 26, 1989, the district court imposed a sentence of twenty-one years, eight months of incarceration, with four years of supervised release. The court based this lengthy sentence upon its finding, over objection of defense counsel, that Pratt was a "career offender" as defined in Section 4B1.1 of the Sentencing Guidelines, because Pratt had two prior Massachusetts convictions for assault and battery on a police officer. Even though these offenses were classified as misdemeanors under state law, the court determined they were felonies as defined in the Commentary to Section 4B1.1 because the offenses carried a maximum term of imprisonment exceeding one year.

In his appeal, Pratt argued, *inter alia*, that the district court erred in excusing Wheeler as a witness when it accepted his blanket assertion of the Fifth Amendment privilege without conducting a particularize inquiry to determine whether the assertion was founded on a reasonable fear of prosecution as to each of the questions posed by defense counsel. Pratt argued that numerous circuit courts had required that the district court conduct a particularized inquiry regarding a witness's blanket assertion of the Fifth Amendment privilege. *United States* v. *Zappola*, 646 F.2d 48, 53-54 (2d Cir. 1981); *North River Insurance Co., Inc.* v. *Stefanou*, 831 F.2d 484, 487 (4th Cir.

1987); *United States* v. *Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *United States* v. *Damiano*, 579 F.2d 1001, 1002-1003 (6th Cir. 1978); *Daly* v. *United States*, 393 F.2d 873 (8th Cir. 1968); *United States* v. *Moore*, 682 F.2d 853 (9th Cir. 1982).

In its opinion, the First Circuit Court of Appeals held that although the district court's discretionary decision "ordinarily requires" a particularized inquiry into the reason for the assertion of the privilege, "this is only a general rule." 913 F.2d at 990. The court held the district court had not abused its discretion in determining that Wheeler had a valid Fifth Amendment claim without making a particularized inquiry.

Pratt also argued on appeal that he was not a career offender, because, although he did have two prior convictions for assault and battery on a police officer, these were state misdemeanors rather than the violent felonies contemplated by the sentencing guidelines. The First Circuit Court of Appeals rejected this argument as well, holding that these offense were "crimes of violence" as defined in 18 U.S.C. Section 16, which states, in pertinent part, that a crime of violence is ". . . an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another . . ."

Reasons for Granting the Writ.

I. This Court Should Resolve the Conflict in the Circuit Courts of Appeal Concerning Whether the District Court Has Discretion to Excuse a Witness, Who Asserts the Privilege Against Self-Incrimination, Without First Conducting a Particularized Inquiry Regarding the Witness's Blanket Assertion of the Privilege.

The privilege against self-incrimination extends to answers that in themselves would support a federal conviction as well

as those that would "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). Nevertheless, the claimant of the privilege must be "confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination." *United States* v. *Apfelbaum*, 445 U.S. 115, 128 (1980). Ultimately, it is for the trial judge to determine whether "a responsive answer to the question [posed] or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-487.

The circuit courts have differed, however, regarding what a proper application of the *Hoffman* standard requires when a witness refuses to testify by asserting the privilege.

The Second Circuit Court of Appeals has held in *Zappola*, *supra*, that a trial judge should not accept a witness's blanket assertion of the Fifth Amendment privilege, and should undertake a focused inquiry into a witness's basis for invocation of the privilege as to each question posed. The underlying rationale for this approach is that although the witness may have a valid claim of privilege to some questions, he may not as to others. 646 F.2d at 54. The court concluded that the witness in *Zappola*, one Marano, a government informant,

> should have been required to respond to some carefully phrased, limited questions by defense counsel concerning the time and place of meetings, the persons with whom he met, that conversations were tape recorded, what the substance of the conversations was, and who said what. Response to questions concerning the purpose of meetings or a summary of prior circumstances may not be required because such information may furnish a link on the chain of

> evidence needed to prosecute Marano for criminal conduct.

Id.

The Fifth and Sixth Circuits have also adopted this approach. In *Damiano, supra*, the Sixth Circuit found that while Damiano could refuse to answer certain questions posed him because they might lead to further prosecutions against him, he could not refuse to testify on Fifth Amendment grounds to certain limited questions concerning matters in which he had cooperated with federal authorities. The court's rationale was that a witness could not legitimately fear prosecution by state or federal authorities based on his answers to questions of limited scope because the witness could not be found to have possessed the requisite *mens rea* where he acted in an undercover capacity for federal authorities. *Id.* at 1002-1003.

Similarly, in *Melchor Moreno, supra*, the Fifth Circuit stated:

> [a] witness may not withhold all of the evidence demanded of him merely because some of it is protected from disclosure by the Fifth Amendment . . . A court must make a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded.

Id. at 1049.

The Ninth Circuit Court of Appeals also requires that the district court conduct a particularized inquiry when confronted with a witness's assertion of the privilege. The Ninth Circuit stated in *United States* v. *Pierce*, 561 F.2d 735 (9th Cir. 1977).

> A proper application of [the *Hoffman*] standard requires that the Fifth Amendment claim be raised in

> response to specific questions propounded by the investigating body. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures. Thus a blanket refusal to answer any question is unacceptable.

Id. at 738.

Both the Fifth and Ninth Circuits recognize an exception, however, where the trial court "based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions.'" *United States* v. *Tsui*, 646 F.2d 365, 367-368 (9th Cir. 1981), quoting *United States* v. *Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980). Nevertheless, these courts have held that this exception "is a narrow one, only applicable where the trial judge has some special or extensive knowledge of the case that allows evaluation of the claimed fifth amendment privilege even in the absence of specific questions to the witness." *Moore*, 682 F.2d at 856. *See also United States* v. *Thorton*, 733 F.2d 121, 125-126 (D.C. Cir. 1984).

The First Circuit Court of Appeals, on the other hand, has never adopted a rule requiring that the district court conduct a particularized inquiry concerning a witness's blanket assertion of the privilege against self-incrimination. Instead, the First Circuit has held that such a decision is left to the almost unfettered discretion of the district judge, who "may apprise a claim of privilege in light of his personal perception of the peculiarities of the case that the witness is mistaken and that the answers 'cannot possibly' incriminate." *United States* v. *Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973). *See also United States* v. *Zirpolo*, 704 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 822 (1983). This was the standard by which the First Circuit upheld the district court's decision in this case excusing

Walter Wheeler as a witness upon his assertion of the Fifth Amendment privilege.

Although this Court has never addressed the precise question raised here, it did consider a similar issue regarding a witness's assertion of the Fifth Amendment privilege in the context of a grand jury proceeding. In *United States* v. *Mandujano*, 425 U.S. 564 (1976), this Court held, *inter alia*, that when a grand jury witness asserts the privilege against self-incrimination, "questioning need not cease, except as to the particular subject to which the privilege has been addressed . . . [citation omitted] . . . Other lines of inquiry may properly be pursued." *Id.* at 581.

The particularized-inquiry approach regarding a witness's assertion of the Fifth Amendment privilege in a trial proceeding is consistent with this Court's decision in *Mandujano*. Although a witness in a trial proceeding, just like a grand jury witness, may have a valid claim of privilege regarding certain questions, he may not as to others. Further, more is at stake in a trial proceeding where the trial court's excusal of a witness summonsed by the defense may deprive the defendant of his Sixth Amendment right to have compulsory process run in his favor, or to confront the witnesses against him. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

In this case, for example, the district court's excusal of Wheeler deprived the defense of an opportunity to examine Wheeler on many topics which would not have incriminated Wheeler at all. Although Wheeler was under indictment in state court for a breaking and entering offense, he could not legitimately fear prosecution with respect to any of the circumscribed questions posed by defense counsel, except possibly questions directed at Wheeler's motive for cooperating with investigating officers in exchange for leniency on the pending state charges.

The materiality and relevancy of Wheeler's excluded testimony cannot be seriously disputed. The sole defense which Pratt sought to rely upon at trial was entrapment. Wheeler was the person who initially approached Pratt to entice him into the proposed drug transaction, and then initiated several more telephone conversations and a meeting to facilitate the transaction which led to Pratt's arrest. The court should have required Wheeler to respond to carefully phrased, limited questions by defense counsel regarding the time and place of meetings; the persons with whom he met; the contents of any conversations with Pratt; the contents of any conversations which were tape recorded and played for the jury at trial; and whether Wheeler, at the behest of the government, had provided Pratt with money to entice him into a drug purchase.[1]

At a minimum, the district court should have allowed Pratt's motion to strike as evidence all tape recordings involving Wheeler, as well as the testimony of Rodriguez stemming from these recordings, because Pratt was denied his right to cross-examine Wheeler regarding the contents and circumstances of the conversations. *United States* v. *Cardillo*, 316 F.2d 606, 613 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

In view of the conflict in the circuits whether the district court is required to conduct a particularized inquiry regarding a witness's blanket assertion of the Fifth Amendment privilege, and the issue's importance to the administration of justice, the petition for certiorari should be granted.

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[1] *None* of these questions would have exposed Wheeler to criminal liability, contrary to the First Circuit's broad and unsupported finding in its opinion that questioning Wheeler at all concerning his cooperation would impinge upon his right against self-incrimination. *Pratt*, 913 F.2d at 990.

II. This Court Should Resolve a Question of First Impression Regarding the District Court's Determination that Petitioner Was a Career Offender Based Upon His Prior Convictions for State Misdemeanors.

The district court imposed a sentence of twenty one years, ten months based upon its finding that petitioner was a career offender under Section 4B1.1 of the sentencing guidelines. This finding enhanced petitioner's offense level from level 26, which provides a sentencing range of 110 to 137 months, to level 34, which provides a sentencing range of 262 to 327 months.

A "career offender" is defined in Section 4B1.1 as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant case is a crime of violence or trafficking in a controlled substance, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

In this case, the district court determined that petitioner was a career offender because he had two prior state convictions for assault and battery on a police officer. In Massachusetts, the offense of assault and battery on a police officer, although a misdemeanor, carries a maximum sentence of two and one-half years in the House of Correction. Massachusetts General Laws, c. 265, § 13D. The Commentary to Section 4B1.1 defines "felony conviction" as:

> a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year regardless of whether such offense

> is specifically designated as a felony and regardless of the actual sentence imposed.

Thus, the district court and the First Circuit Court of Appeals were of the opinion that petitioner was a career offender because petitioner's prior crimes fit the Commentary definition of "felony conviction" since they carried a maximum sentence of more than one year.

Nevertheless, petitioner's prior crimes clearly do not constitute "crime[s] of violence" as set forth in the Commentary to Section 4B1.1 which states, in pertinent part, that a "crime of violence" is interpreted by the Sentencing Commission as:

> . . . murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery . . . Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition . . .

The crimes listed in the Commentary are all serious felonies which carry penalties ranging from a term of years to, in some jurisdictions, the death penalty. The term "violent felony" obviously contemplates the infliction or threat of infliction of serious bodily harm.

The only offense listed in the Commentary which resembles the offense of assault and battery on a police officer is "aggravated assault." However, at common law, "aggravated" assault was distinguished from "simple" assault as an assault in which either a dangerous weapon was used, or serious physical injury inflicted. *See State* v. *Henley*, 141 Ariz. 465 (1984); *State* v. *Bitting*, 162 Conn. 1 (1971); *Bruce* v. *State*, 142 Ga. App. 211 (1977); *Goswick* v. *State*, 143 So.2d 817 (Fla. 1962); *State* v. *Blaise*, 504 So.2d 1092 (La.App. 5th Cir. 1987). In

this case, petitioner did not use a weapon in committing any of the prior crimes alleged, nor did he inflict serious injury.[2]

The First Circuit Court of Appeals attempted to refute the petitioner's argument on appeal by reliance on the statutory definition of "crime of violence" set forth in Title 18, United States Code, Section 16, which provides:

> (a) an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Pratt, 913 F.2d at 993.

However, the incorporation of a statutory definition not even included in the sentencing guidelines is inapposite here, because the case involves the interpretation of a penal statute which must be strictly construed in favor of the petitioner.

Petitioner's prior crimes were clearly not of the magnitude contemplated in the career offender provision of the sentencing guidelines which authorizes such a drastic enhancement of sentence. The length of petitioner's sentence is excessive and so disproportionate to his offense that it "shocks the conscience" and violates petitioner's Eighth Amendment right to be free from cruel and unusual punishment. *Trop* v. *Dulles*, 356 U.S. 86 (1958).

In view of the ambiguity regarding the definition of career offender as applied to the petitioner in this case, and the issue's

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[2] In Massachusetts, there is no crime of "aggravated assault" — only the offense of assault and battery with a dangerous weapon which constitutes a *felony*, and which carries a maximum sentence of 10 years in state prison. Massachusetts General Laws, Chapter 265, § 15.

importance to the administration of justice, the petition for certiorari should be granted.

Conclusion.

For the foregoing reasons, petitioner's petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

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APPENDIX A

United States Court of Appeals

for the First Circuit

No. 89-1964

UNITED STATES OF AMERICA,
APPELLEE,

v.

JAMES L. PRATT, JR.,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before
Torruella, Selya and Cyr,
Circuit Judges.

Conrad W. Fisher, with whom *Fisher, Mandell & Newlands* and *Donald A. Harwood*, were on brief for appellant.

C. Jeffrey Kinder, Assistant United States Attorney, with whom *Wayne A. Budd*, United States Attorney, was on brief for appellee.

August 28, 1990

TORRUELLA, *Circuit Judge*. James L. Pratt brings this appeal from a jury verdict convicting him of conspiracy to

possess with intent to distribute five hundred or more grams of cocaine.[1] 21 U.S.C. § 846. The United States District Court for the District of Massachusetts denied appellant's motions for a judgment of acquittal and for a new trial, and sentenced him to twenty-one years and eight months of incarceration, with a four year term of supervised release. This appeal followed.

I. BACKGROUND

On January 3, 1989, the Hampshire/Franklin County Crime Prevention and Control Unit ("CPAC") was approached by an informant, Walter Wheeler, who sought to exchange his cooperation in the instant case for government assistance with a pending state charge against him. The case was subsequently referred by CPAC to the Western Massachusetts Narcotics Task Force ("Task Force"), a federal agency comprised of federal, state and local police officers assigned to do narcotics work. A federal Drug Enforcement Administration ("DEA") agent heads the Task Force.

Wheeler's first meeting with the Task Force took place in the Federal Building at DEA offices in Springfield, Massachusetts on January 10, 1989. At that meeting, he provided certain information about Pratt, with whom he had been incarcerated, linking Pratt to cocaine trafficking. Thereafter, it was agreed that Wheeler would place a telephone call to appellant and attempt to arrange a meeting between Pratt, himself, and Detective Luis M. Rodriguez. Rodriguez was a deputized Federal Agent assigned to the Task Force, although he was also associated with the Chicopee, Massachusetts Police Department.

Shortly after 7:00 p.m. that evening, Wheeler reached Pratt by telephone and the two agreed to meet at the Yankee Peddlar Restaurant in Holyoke, Massachusetts at 8:15 p.m. This con-

[1] The jury failed to reach a unanimous verdict as to the only co-defendant, and a mistrial was declared on the co-defendant's case.

versation was recorded.[2] At about 8:00 p.m., Pratt arrived at the appointed place in a yellow Saab driven by the co-defendant. The Saab parked next to a black Camaro occupied by Agent Rodriguez, who was wearing a body wire, and Wheeler. After introductions were made, Rodriguez offered to sell appellant a kilogram of cocaine for $15,000, rather than his "usual price" of $22,000, because of Pratt's connection with Wheeler. At one point, Pratt or Wheeler apparently told the other that this transaction was a sort of "payback" for Pratt's having bailed Wheeler out of jail. Having only $5,000, Pratt inquired about Rodriguez' willingness to sell an "eightball," or one-eighth of an ounce of cocaine. Rodriguez told appellant that he did not have any cocaine with him, but that, in any case, he would only sell kilo packages.

Pratt and Agent Rodriguez arranged a second meeting for January 12th at 8:00 p.m. in the same parking lot. Appellant failed to appear. Thereafter, two telephone calls were made to Pratt. During both of these conversations, appellant indicated that he was having difficulty raising the $15,000. Pratt proposed an alternative plan, wherein Rodriguez would take $6,000 cash and title to a new Camaro automobile as security for the remainder. Rodriguez agreed.

The next contact between Rodriguez and Pratt occurred on January 17th at 10:30 p.m. At that time, Rodriguez received a call from Pratt on his beeper, and Rodriguez returned the call.[3] During this telephone conversation, Pratt indicated that he had $15,000 and wanted to "do the deal" that night. Rodriguez, however, suggested that they meet the following day.

The next morning, Rodriguez called Pratt. During that conversation, which was recorded, Rodriguez told appellant that, while Wheeler had informed him that appellant only had $12,500,

[2] On appeal, Pratt contends that statements made during this recording make it clear that Wheeler had spoken to appellant on at least one previous occasion.

[3] This conversation may or may not have been recorded.

he was willing to take that sum for the kilogram. A meeting was arranged for 1:00 p.m. at the Yankee Peddlar.

Rodriguez arrived at the Yankee Peddlar at 12:30 p.m., accompanied by Task Force Agent Ron Campurciani. Approximately 15 to 20 other officers were stationed in various areas of the parking lot. Sometime later, Pratt arrived in a 1980 Chevrolet Citation, driven by the co-defendant. Rodriguez entered Pratt's car, and a recorded conversation ensued. Pratt told him the money was in his jacket, and Rodriguez then took the money and counted it. After Rodriguez finished counting the money, he suggested that they go to his car to check the cocaine and to meet Agent Campurciani, who Rodriguez explained was his "runner." Once Campurciani opened the car's trunk, the police surveillance team moved in to effect arrests of both Pratt and the co-defendant. $12,500 was seized from the Chevy Citation.

On appeal, appellant makes several claims of error, each of which we review *seriatim*.

II. DENIAL OF MOTION TO SUPPRESS ELECTRONICALLY INTERCEPTED COMMUNICATIONS

At trial, Pratt moved to suppress the electronically-intercepted conversations involving himself, Wheeler and Agent Rodriguez. It is uncontested that the conversations were recorded without a wiretap warrant and without appellant's knowledge or consent. Appellant sought to establish that the investigation was conducted primarily by state, rather than federal law enforcement officers, and hence that the Massachusetts wiretap statute, Mass. Gen. L. ch. 272, § 99, rather than federal law, 18 U.S.C. § 2510 *et seq.* (1982), governed the admissibility of the evidence. *See United States* v. *Jarabek*, 726 F.2d 889, 900 n.10 (1st Cir. 1984) (dictum) (where state officers knowingly violate state law without federal involve-

ment, state law *may* apply in federal prosecution); *United States* v. *Daniel*, 667 F.2d 783, 785 (9th Cir. 1982) (discussing, but not deciding the issue). The Massachusetts statute prohibits use of electronically intercepted communications unless both parties consent to the interception, or unless one party consents and the eavesdropper is a law enforcement officer investigating organized crime.[4] The district court denied appellant's motion on the theory that federal law governed the admissibility of the evidence, and permitted introduction of the recordings.

On appeal, Pratt first argues that the district court found that the investigation "was primarily a state operation," and therefore, that state law should have been applied. He contends that, since this is a factual finding, it is reviewable only for clear error. *E.g.*, *United States* v. *Cruz Jiménez*, 894 F.2d 1, 7-8 (1st Cir. 1990). While we will not disagree with this statement of the standard of review associated with factual findings, we do find fault with appellant's statement of the fact itself.

Appellant's interpretation of the district court's statement supports his position only if one reads the statement out of the context in which it was made. The whole statement was, "[t]he Court's impression, based on the record before it, is that this was primarily a state operation." Not only was this comment made before the trial began, but it was also made expressly conditional upon the facts before the court at that time. It is clear from the record that, at that point, the district court had heard no evidence regarding the referral of the case from the state CPAC Unit to the federal Task Force, or of the ensuing federal investigation. Thus, Pratt's emphasis of this single statement does not persuade this court that an error was made below.

[4] In the briefs sumitted to this court, the government concedes that this case does not involve organized crime, and thus that application of Massachusetts law would result in the recordings being deemed inadmissible.

Having thus concluded, we turn to the merits of the claim itself. On appeal, appellant argues that the district court's denial of his motion to suppress the recordings, on the grounds that *United States* v. *Aiudi*, 835 F.2d 943 (1st Cir. 1987), *cert. denied*, 485 U.S. 978 (1988), eliminated the need for such exclusion, constituted reversible error. In *Aiudi*, this court held that a search conducted by state police officers pursuant to an invalid warrant did not necessitate suppression of the evidence in federal court because a federal agent, who was at the scene at the time of the search, had authority to enter the premises without a warrant to do "legally . . . exactly what . . . the (state) police did unlawfully." *United States* v. *Aiudi*, 835 F.2d at 946.

Appellant contends that *United States* v. *Aiudi* is distinguishable from the case at bar. He argues that the *Aiudi* rule applies only when a federal agency is conducting an investigation independent of that of state officers, and therefore has no incentive to encourage misconduct by state police. Pratt contends, however, that in this case, although federal officers were aware of the investigation, they were not participants. Thus, he concludes that this is a case "where the federal government sat back and allowed illegally seized evidence to be handed them on a 'silver platter,' " *id.* at 946, thus mandating suppression of the evidence. Finally, appellant argues that *Aiudi* did not involve wiretap surveillance, and therefore has little applicability to the instant case.

After review of the record, we think it evident both that *Aiudi* was correctly utilized by the district court and that the investigation was primarily a federal affair. *Aiudi*, in applying *Elkins* v. *United States*, 364 U.S. 206 (1960), stated that "*Elkins* teaches that federal prosecutors cannot use evidence illegally procured by state officials when the 'evidence [was] obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immu-

nity from unreasonable searches and seizures.'" *Aiudi*, 835 F.2d at 946 (citing *Elkins* v. *United States*, 364 U.S. at 223). *Aiudi*, therefore, applies to exclude evidence only where the evidence is state-seized, and where the federal officers lacked the authority to legally obtain what state officers took illegally. *Aiudi*, 835 F.2d at 946.

In this case, it is clear that federal officers did have the authority to record the conversation, and thus had no incentive to encourage unlawful conduct on the part of the state officers. While it is certainly true, as a general rule, that eavesdropping and wiretapping are permissible only with probable cause and a warrant, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, *reh'g denied*, *Ivanov* v. *United States*, 394 U.S. 939 (1969), under federal law, consent of one party to a conversation is sufficient to permit "a person acting under color of law to [lawfully] intercept a wire, oral, or electronic communication . . ." 18 U.S.C.A. § 2511(c) (West Supp. 1990). *See also Katz* v. *United States*, 389 U.S. 347 (1967). Although Massachusetts law goes further to protect the privacy rights of both parties to a conversation than does federal law, Mass. Gen. L. ch. 272, § 99, it is well settled that, in federal prosecutions, evidence admissible under federal law cannot be excluded simply because it would be inadmissible under state law, and the district court was correct in so concluding. *E.g.*, *United States* v. *Mitro*, 880 F.2d 1480, 1485 n.7 (1st Cir. 1989).

Moreover, in this case, the disputed evidence cannot be said to be "state-seized," having been, at most, the product of a joint federal-state investigation. Consequently, as the district court properly held, *Aiudi* does not require suppression of the evidence. Although Wheeler's initial contact with law enforcement authorities was with state and local police, the case was immediately referred to the Western Massachusetts Narcotics Task Force. The Task Force was comprised of state and local law enforcement officers as well as federal agents, but it was headed by a federal DEA agent, and the agent assigned to inves-

igate the instant case was a deputized federal agent. Moreover, Wheeler's first meeting with the Task Force took place at the Drug Enforcement Administration's offices in the Federal Building in Springfield, Massachusetts, and all but one of the persons at the meeting was a member of the Task Force. From the evidence before this court and the district court, it appears that, after the case was referred to the Task Force, it was investigated exclusively by Task Force personnel.

Even if the investigation could not entirely be considered a federal venture, under *United States* v. *Jarabek*, the admissibility of evidence obtained during a joint federal-state investigation for use in a federal criminal trial is governed by federal law. *United States* v. *Jarabek*, 726 F.2d at 900. *See, e.g., United States* v. *Butera*, 677 F.2d 1376, 1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir.), *cert. denied*, 423 U.S. 925 (1975). In *Jarabek*, this court held that the more restrictive provisions of the Massachusetts electronic interception statute did not apply to a joint federal-state investigation. *See also United States* v. *Butera*, 677 F.2d at 1380; *United States* v. *Horton*, 601 F.2d 319, 323 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *United States* v. *Nelligan*, 573 F.2d 251, 253 (5th Cir. 1978); *United States* v. *Shaffer*, 520 F.2d 1369, 1371-72 (3d Cir. 1975) (per curiam), *cert. denied*, *Vespe* v. *United States*, 423 U.S. 1051 (1976).

Nor does the fact that Agent Rodriguez was a member of the Chicopee, Massachusetts Police Department, as well as being a member of the Task Force, render the federal law inapplicable. *United States* v. *Butera*, 677 F.2d at 1380; *United States* v. *Nelligan*, 573 F.2d at 253. During the course of the investigation, Agent Rodriguez was clearly acting in his capacity as a deputized federal agent for the Task Force. *See United States* v. *Gray*, 626 F.2d 102, 105-06 (9th Cir. 1980) (state officers working with the DEA were acting in a "federal capacity" at time of search, rendering federal law applicable).

Given the facts of this case, the district court did not err in concluding that the investigation was primarily conducted by federal officials, and thus that suppression of the recordings was not required by federal law.

III. ENTRAPMENT

At trial, appellant sought to justify his behavior on the theory that he had been entrapped, a defense which is premised on the principle that a defendant may not be found guilty of criminal conduct which is "the product of the creative activity" of law enforcement officials. *Sorrells* v. *United States*, 287 U.S. 435, 441, 451 (1932). In *Sorrells*, the Court stated that entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* at 442 (*quoted in Kadis* v. *United States*, 373 F.2d 370, 372 (1st Cir. 1967)). *See also Newman* v. *United States*, 299 F. 128, 131 (4th Cir. 1924). As the doctrine has evolved, a two stage inquiry is relevant to the issue of entrapment: (1) whether there was government inducement of the crime; and (2) whether the defendant was predisposed to engage in the criminal conduct. *Mathews* v. *United States*, 485 U.S. 58 (1988); *United States* v. *McKenna*, 889 F.2d 1168, 1174 (1st Cir. 1989); *United States* v. *Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988); *United States* v. *Polito*, 856 F.2d 414, 415-16 (1st Cir. 1988); *Kadis* v. *United States*, 373 F.2d at 372 (citing *United States* v. *Sherman*, 200 F.2d 880 (2d Cir. 1952)). *See also Sherman* v. *United States*, 356 U.S. 369, 372 (1958). On appeal, appellant avers that the district court erred in excluding certain testimony related to the defense, as well as by refusing to instruct the jury on entrapment.

A. Submission to the Jury

The question of whether entrapment occurred is factual in nature, and requires submission to the jury if there is "some evidence" of it. *Kadis* v. *United States*, 373 F.2d at 374.

> If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness. *See United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966).

Kadis v. *United States*, 373 F.2d at 374. The quantum of evidence needed to reach the level of "some evidence" "need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal, *cf. McDonald* v. *United States*, 312 F.2d 847, 849 (D.C. Cir. 1962), but it must be more than a mere scintilla . . . However, any evidence, whether introduced by the defense or by the prosecution, that the government agents went beyond a simple request and pleaded or argued with the defendant, should be enough." *Kadis* v. *United States*, 373 F.2d at 374. But it is the defendant who has the burden of proving that entrapment occurred. *United States* v. *Rodriguez*, 858 F.2d at 812; *United States* v. *Coady*, 809 F.2d 119, 122 (1st Cir. 1987). In meeting that burden, the defendant must make a showing "that a government agent turned him from a righteous path to an iniquitous one . . ." *United States* v. *Coady*, 809 F.2d at 122. *See also United States* v. *Rodriguez*, 433 F.2d 760, 761 (1st Cir. 1970), *cert. denied*, *Rodriguez*, v. *United States*, 401 U.S. 943 (1971). While our review of the district court's decision not to instruct on the eefense is plenary, *United States* v. *Rodriguez*, 858 F.2d at 812, because

it involves an inquiry into the sufficiency of the evidence rather that a differential fact finding, *accord United States* v. *Ortiz*, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986) (cited by *United States* v. *Rodriguez*, 858 F.2d at 812), upon review we find that the district court did not err in concluding that Pratt failed to sustain his burden.

A defendant is only entitled to a jury instruction on entrapment if:

> there is record evidence which fairly supports the claims of both government inducement of the crime and defendant's lack of predisposition to engage in it . . . When all is said and done, however, there must be some hard evidence in the record which, if believed by a rational juror, would suffice to create a reasonable doubt as to whether government actors induced the defendant to perform a criminal act that he was not predisposed to commit. The existence or nonexistence of such a quantum of evidence in a given case is, we think, a matter of law for the court.

United States v. *Rodriguez*, 858 F.2d at 814. *Accord United States* v. *Jannotti*, 729 F.2d 213, 224 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984). Although the question is admittedly a close one, even viewing the evidence in the light most favorable to appellant, as we must, we believe that a reasonable juror could not have determined that Pratt was entrapped.

In support of his contention that there was sufficient evidence of entrapment to allow the issue to go to the jury, appellant argues several things. First, he argues generally that law enforcement officials instigated the drug transaction, and that he had no intent to purchase a kilogram of cocaine, as evidenced by his bringing only $5,000 to the initial meeting. Second, he contends that Agent Rodriguez enticed him into buying a large

quantity of cocaine by attesting to its purity, by lowering the price and by refusing to sell a smaller quantity of cocaine. Third, Pratt argues that his failure to telephone Rodriguez and to appear at a meeting, constitute evidence of unreadiness or lack of predisposition. Finally, appellant avers that the multiple telephone calls made by Rodriguez and Wheeler to him are equatable with impermissible persuasion.

We cannot agree. The facts, taken in context, are simply not susceptible to the gloss which appellant would have us place on them. The evidence showed that, prior to the transaction here at issue, Pratt had dealt in narcotics, thus indicating a predisposition to engage in the purchase and sale of cocaine. *See United States* v. *Espinal*, 757 F.2d 423, 425 (1st Cir. 1985). Not only had he been a drug dealer for some time, but he was knowledgeable about the price and quality of cocaine and the record demonstrates that he was anxious to develop a new source of supply. Additionally, there was uncontradicted testimony that, during the initial meeting between Pratt and Rodriguez, Pratt asked what the price of a kilo was before anyone had even mentioned cocaine. Pratt also queried Rodriguez about the source of the agent's cocaine, averring that it came from his usual source. Moreover, Pratt admitted that the police had recently seized two kilos of 92% pure cocaine from him. At no time did Pratt ever reject the offer to purchase cocaine from Rodriguez.

This is not a case where government agents begged or pleaded with an unwilling target. Indeed, the evidence shows nothing more than that the government created the opportunity for Pratt to become criminally involved. *See United States* v. *Coady*, 809 F.2d at 122. The fact that Agent Rodriguez put up the pretense of being a drug dealer, and solicited Pratt's business, does not, without more, make the government's involvement rise to the level of entrapment. *United States* v. *Espinal*, 757 F.2d at 425. Pratt's failure to telephone Rodriguez

or to appear at meetings, can as well be attributed to difficulties in raising the purchase money as they can be to reluctance to enter into the transaction. Indeed, as the district court implicitly found, reluctance appears to be an intrinsically improbable conclusion in light of the evidence presented concerning Pratt's predisposition. As this court has held, value or conclusory statements are not sufficient to raise a genuine issue of material fact. *E.g., United States* v. *Kakley*, 741 F.2d 1, 4 (1st Cir.), *cert. denied*, 469 U.S. 887 (1984). The evidence was sufficient to permit the district court to conclude that, in the end, Pratt became the driving force behind completion of the deal, and thus that he was not entrapped.[5] Since the evidence did not support Pratt's contention that he was "lured or exploited," the district court did not err in failing to instruct the jury on the entrapment defense.

B. Exclusion of Testimony

Appellant next argues that the district court erred in excluding testimony, which, he argues, relates to his alleged susceptibility to entrapment. Pratt contends that testimony should have been permitted with regard to his subnormal intelligence, mental deficiencies, impulsivity, and his cocaine and alcohol dependency. This evidence was, he asserts, highly probative with regard to his entrapment theory.

We need not address this point on the merits. If relevant at all — and we do not suggest that that was the case — the evidence bore only on lack of predisposition. But, a defendant's entry-level burden has two prongs. *See supra* pp. 11-12 and cases cited. [A9] Inasmuch as there was insufficient evidence on the first prong (inducement) to take entrapment to the jury,

[5] Appellant also makes an argument that, at the time of the transaction, he was gainfully employed, and that his employment status alone constitutes more than the "mere scintilla" of evidence which was needed to get the issue to the jury. We find this argument peccant.

see supra Part III(A), any error in admitting "lack, of predisposition evidence" was harmless. *See United States* v. *Polito*, 856 F.2d at 417 n.3 (failure to prove inducement renders "the state of the record" on predisposition "virtually academic"). At any rate, even if the evidence is viewed as relating to the inducement prong, we cannot say that the court below abused its broad discretion in excluding the proffer. *See United States* v. *McKenna*, 889 F.2d at 1175.

IV. FAILURE TO ORDER GOVERNMENT INFORMANT TO TESTIFY

The government informant, Walter Wheeler, was summonsed as a witness by Pratt, but upon the advice of counsel, refused to answer questions on the ground that his answers might incriminate him. This Fifth Amendment privilege was asserted on the basis of the state charges for which he had originally sought leniency through cooperation. Appellant contends that the privilege should not have been sustained by the district court, primarily because no particularized inquiry of Wheeler was made regarding his blanket assertion of the Fifth Amendment privilege. He contends that excusing Wheeler from testifying rose to the level of a constitutional violation, because his rights to confrontation and compulsory process were denied when he was precluded from questioning the most important government witness. Wheeler's testimony, he avers, was both material and relevant to his only defense: entrapment. Finally, Pratt argues that, instead of excusing Wheeler from testifing, the district court should have granted Wheeler immunity, and that it was error for it to have refused to do so.

The privilege granted by the Fifth Amendment is indeed quite broad, and may be asserted in the face of the possibility of state prosecution. *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964); *In re Brogna*, 589 F.2d 24, 27 (1st Cir. 1978). Anyone claiming

the privilege, however, must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Rogers* v. *United States*, 340 U.S. 367, 374, *reh'g denied*, 341 U.S. 912 (1951). *See also United States* v. *Apfelbaum*, 445 U.S. 115, 128 (1980); *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968). This is a determination for the court, not the witness, to make, *Hoffman* v. *United States*, 341 U.S. 479 (1951), and is subject to the discretion of the district court. *Id.* The exercise of this discretion, however, ordinarily requires that a particularized inquiry into the reasons for the assertion of the privilege be made. *See United States* v. *Pierce*, 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *North River Ins. Co.* v. *Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). But this is only a general rule. In this case, we find that the district court did not abuse its discretion in determining that Wheeler had a valid Fifth Amendment claim.

At the time of Pratt's trial, a motion was pending to dismiss Wheeler's state criminal charge. This motion was based on allegations of prosecutorial misconduct by state authorities during Wheeler's cooperation in the Pratt investigation. Wheeler's cooperation was the same topic upon which Pratt's attorney sought to examine him at trial. Given these facts, this court is unable to conclude that the district court erred in allowing Wheeler's Fifth Amendment assertion to stand.

Nor do we find merit in Pratt's argument that the district court erred in denying his request to grant Wheeler immunity in the face of his asserted claim of the Fifth Amendment privilege. A defendant has no general right to obtain, and a district court has no general power to grant, immunity for defense witnesses. Instead, the power to apply for immunity rests solely with the government. *United States* v. *Davis*, 623 F.2d 188 (1st Cir. 1980). In the face of the government's refusal to seek immunity for Wheeler, the district court did

not err in denying immunization to Wheeler, and thus excusing him from testifying.

Although there may be certain circumstances under which due process requires defense witnesses to be immunized, *see, e.g., United States* v. *Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948, *reh'g denied*, 429 U.S. 873 (1976), the facts in this case do not suggest that an exception to the general rule was warranted. *See United States* v. *Angiulo*, 897 F.2d 1169, 1190-93 (1st Cir. 1990). In that case, we recognized two theories under which defendants are entitled to a grant of immunity for prospective witnesses. Under the "effective defense theory," a court has power to immunize witnesses whose testimony is essential to an effective defense. Similarly, under the "prosecutorial misconduct theory," courts have authority to require the government to grant immunity to witnesses if the government has deliberately attempted to distort the fact-finding process. *See also United States* v. *Morrison*, 535 F.2d 223, 229 (3d Cir. 1976); *Government of Virgin Islands* v. *Smith*, 615 F.2d 964, 969 (3d Cir. 1980). In this case, however, it is clear that Wheeler's testimony was not essential to an effective defense. The transcript of Wheeler's interview with the CPAC Unit on January 3, 1989 revealed only facts which tended to inculpate Pratt. The fact that, as appellant argues, Wheeler may have been used to encourage Pratt to buy cocaine, and that Wheeler participated in recorded conversations which were then played to the jury, does not suggest a defense. Nor is there evidence of any type of prosecutorial misconduct impinging upon the fact-finding process. Thus, we find no error in the district court's refusal to grant Wheeler immunity from prosecution.

V. DENIAL OF MOTION FOR ACQUITTAL ON THE CONSPIRACY CHARGE

Appellant moved for judgment of acquittal on the conspiracy charge at the close of the government's case, at the close of all the evidence and after the guilty verdict was returned. The motions were consistently denied. On appeal, Pratt argues the evidence was insufficient to support of guilty verdict for several reasons. First, he contends that a person cannot conspire with himself, and thus that the government must prove that there were at least two persons involved in the conspiracy. *Iannelli* v. *United States*, 420 U.S. 770 (1975), *overruled on other grounds*, *Brown* v. *Ohio*, 432 U.S. 161 (1977). The indictment alleged that Pratt conspired with the co-defendant, the driver of his car, to commit the underlying offense. Although the indictment also alleged that Pratt conspired with persons unknown, no evidence was presented of the existence of the unknown persons or of a conspiracy with them. Thus, appellant argues that, for the conspiracy conviction to be sustained, the government must have proved that Pratt conspired with the co-defendant. This, he argues, the government failed to do. According to his analysis, the only evidence of the co-defendant's participation in the venture was his "mere presence" at the scene of the alleged crime, and "mere presence" is not enough to support a conspiracy claim. *United States* v. *Smith*, 680 F.2d 255 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). Pratt contends that the co-defendant did nothing more than to drive him to the meeting place.

But Pratt's argument has a fatal flaw. It is well settled that a conspiratorial agreement may be proven by circumstantial as well as direct evidence. *Glasser* v. *United States*, 315 U.S. 60 (1942), *reh'g denied*, *Kretske* v. *United States*, 315 U.S. 827 (1941). Such evidence existed here. From the evidence presented, the jury could reasonably have found that Pratt con-

spired with (1) the named co-defendant (2) his unnamed "partner" and (3) Pratt's wife. First, the evidence showed that Pratt and the co-defendant had known each other for ten years, and when, at their initial meeting, Rodriguez asked Pratt who the co-defendant was, Pratt responded, "He's been with me for a long time." Second, when Pratt failed to appear at the next meeting, Rodriguez placed many phone calls to Pratt in an effort to close the deal, and five of those calls were placed to a number supplied by Pratt: the co-defendant's number. It was also reasonable for the jury to infer from the co-defendant's statements on the phone that he had knowledge of the contemplated transaction. Third, at the final meeting, Rodriguez entered the vehicle that the co-defendant had driven, and began to count the $12,500 in his presence. When Agent Rodriguez inquired about the co-defendant's identity, Pratt, referring to the co-defendant, and in the co-defendant's presence, said, "He is my runner. He deals for me." Viewed in the light most favorable to the government, the evidence is sufficient to permit a jury to reasonably conclude that the co-defendant was a knowing participant in the conspiracy.

Even if, however, the evidence was not sufficient to prove a conspiracy with the co-defendant, there was evidence from which a jury could conclude that Pratt conspired with either of two unnamed co-conspirators. When Pratt had difficulty coming up with the purchase price, he proposed that Rodriguez accept $6,000 and the title to his partner's Camaro, although the vehicle was never produced. From this, the jury could have inferred that Pratt conspired with this "partner." A similar conclusion was reasonable in light of the evidence implicating Pratt's wife as a knowing co-conspirator. Rodriguez had four conversations with her when he called the co-conspirator's residence, and she assisted him in locating Pratt. While this evidence is, without question, circumstantial, under the circumstances of this case, it is sufficient to sustain a conviction for conspiracy.

VI. DENIAL OF MOTION FOR NEW TRIAL

Appellant's next argument is that rule of consistency requires the entry of a judgment of acquittal because the jury was unable to reach a unanimous verdict as to the co-defendant, and that the district court erred by failing to do so. He contends that the rule of consistency requires that, when all possible co-conspirators are tried jointly, an acquittal of one of two conspirators operates as an acquittal of the other. *See United States* v. *Bosch Morales*, 677 F.2d 1 (1st Cir. 1982), *overruled, United States* v. *Bucuvalas*, No. 89-1803, slip op. at 14 (1st Cir. July 25, 1990); 1990 U.S. App. LEXIS 12459.

The rule of consistent verdicts does not, however, apply where, as here, the jury has reached a guilty verdict on one defendant, but cannot arrive at a unanimous decision as to the only possible co-conspirator. *United States* v. *Bucuvalas*, slip. op. at 14. Moreover, we note that the rule of consistency is an exception, observed by only a limited number of courts, to the general rule that inconsistency in a verdict is not a sufficient reason for setting it aside. *Dunn* v. *United States*, 284 U.S. 390 (1932), *overruled on other grounds, Sealfon* v. *United States*, 332 U.S. 575 (1948), as stated in *United States* v. *Powell*, 469 U.S. 57 (1984). Even before we overruled *United States* v. *Bosch Morales*, 677 F.2d 1, in *Bucuvalas, supra*, the rule of consistency only mandated acquittal of co-defendants tried together in a conspiracy case where the jury acquitted all possible co-conspirators save one. In this case, however, the rule of consistency would not apply because none of Pratt's possible co-conspirators were acquitted. Mrs. Pratt and the partner were never charged, and thus could not have been acquitted. As to the only named co-defendant, the jury failed to reach a unanimous verdict, and a mistrial was declared. This is not the equivalent of an acquittal. *See United States* v. *Sangmeister*, 685 F.2d 1124, 1127 (9th Cir. 1982);

United States v. *Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981) (hung jury may reflect independence of jury rather than insufficient evidence). *Cf. United States* v. *Shipp*, 359 F.2d 185 (6th Cir.), *cert. denied*, 385 U.S. 903 (1966) (jury's failure to reach a verdict is a non-event). Thus, the district court did not err in failing to grant Pratt's motion for a new trial and for a judgment of acquittal on the conspiracy charge.

VII. PROPRIETY OF DEFENDANT'S SENTENCE

Appellant next contends that the district court's imposition of a 21 year sentence, enhanced under the career offender provision of the sentencing guidelines, was clearly erroneous. Under the sentencing guidelines, a career offender is defined as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a crime of violence or trafficking in a controlled substance, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1. Pratt argues that he was not a career offender, because, although he did have two prior convictions for assault and battery on a police officer, these were *state* misdemeanors rather than the violent felonies contemplated by the sentencing guidelines. Appellant contends that, although his prior convictions fall within the Sentencing Guideline Commentary's definition of a felony conviction because they carry more than a one-year maximum sentence, the crimes listed in the Commentary are all serious felonies which contemplate the infliction or

threat of infliction of serious bodily harm. The simple assaults for which he was convicted, he argues, are not such crimes.

We do not agree. A crime of violence is defined in 18 U.S.C. § 16 as:

> (a) an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Pratt's pre-sentence report lists eighteen separate convictions or juvenile adjudications, and three of these convictions qualify as "crimes of violence." The fact that simple assault and assault on a police officer are not listed as examples of crimes of violence in the Guidelines' Commentary is not sigificant in light of our finding that the Commentary is not meant to be an exhaustive list of all offenses qualifying as violent. The district court, having properly concluded that appellant qualified as a career offender, imposed a sentence within the applicable Guidelines range, and committed no error in doing so.

VIII. CONCLUSION

For the reasons detailed above, we affirm the decision of the district court in all respects.

Affirmed.

APPENDIX B

Relevant Portions of Transcript, Volume 3

[156]

taken into another room and they talked.

Now, I don't offer this affidavit for the jury but I say that there were certain portions of it that were shown to you, marked as exhibit for identification, indicating that one, there is in fact entrapment; two that the government here instead of lowering the bail which they could have done to the state they gave him the money, gave it to him.

This kid was so high as a kite he gets into a car fire. He is sitting in the car. They have to pull him out of it. He is so high on drugs and booze, take him to the hospital, get his hand fixed. They take him, almost eight thousand dollars. Under the order of the District Attorney they take the money even though they had no legal right to take it.

THE COURT: Let me see that first paragraph. I don't see how that helps you. I say I don't see how that helps Defendant Pratt. He is saying that he wanted to explore the possibility of cooperating. It doesn't say anything about any deal with the other prosecution.

[157] MR. TROY: They passed him on to the federal government.

THE COURT: Well, what was your conversation with Schlang?

MR. TROY: Schlang says he is going to take —

THE COURT: (Interposing) So you want him to testify?

MR. TROY: Yes, but naturally if you immunize him —

THE COURT: (Interposing) I do not intend to immunize him on the basis of law as I see it.

Attorney Schlang would you come forward please. All right. For the record this is Attorney Schlang, Steven Schlang of Northampton. You represent Walter Wheeler?

MR. SCHLANG: Yes, I do your Honor.

THE COURT: Impending action?

MR. SCHLANG: Yes.

THE COURT: As I understand it from what I have heard from Attorney Troy, you will instruct your client to take the fifth amendment if **[158]** he is offered here.

MR. SCHLANG: Yes.

THE COURT: Is that correct?

MR. SCHLANG: Absolutely.

MR. TROY: I am assuming Judge, we will put him on the stand absent the jury and ask him these questions because he may not follow his instructions.

MR. SCHLANG: He will follow my instructions.

MR. TROY: I would like it on the record.

THE COURT: All right. Have him come forward. I will ask him, you can ask him a couple questions as to this case, if he takes the fifth amendment.

MR. SCHLANG: With the court's permission, is it okay for me to stand by my client?

THE COURT: Yes. Mr. Wheeler would you come forward please, over here please. Raise your right hand.

(Witness sworn)

[159] DIRECT EXAMINATION BY MR. TROY

Q. (By Mr. Troy) Sir, would you give the court your name?

A. Walter Wheeler.

Q. Where do you live Mr. Wheeler?

A. Northampton.

Q. Sir, do you know the defendant, Mr. Pratt?

A. Take the fifth.

Q. Can't hear you, I'm sorry?

Q. On the advise of my counsel I said take the fifth amendment.

Q. Sir, did you file an affidavit in superior court?

MR. TROY: One moment please, your Honor:

Q. (By Mr. Troy) Did you file an affidavit on April 30, 1989 in Superior Court in support of a motion to dismiss and sign it?

A. I take the fifth.

Q. You take the fifth?

A. Yes, I do.

[160] Q. Is that your signature, sir?

A. I take the fifth.

MR. TROY: We will be offering a clean copy for identification, your Honor.

THE COURT: Very well.

Q. (By Mr. Troy) Mr. Wheeler, were you supplied five thousand dollars by the, strike that, is it Hampshire County District Attorney's office for purposes of assisting to entrap one James Pratt in a drug deal?

A. I take the fifth.

Q. Sir, drawing your attention to year 1988 and in December, were you incarcerated in jail along with the defendant, Pratt?

A. I take the fifth.

Q. Take the fifth?

A. Yes, I do.

Q. And did you in fact speak with Mr. Pratt in an effort to get him to bail you out on five thousand dollars cash bail?

A. I take the fifth.

Q. Did you do so under the direction of a law enforcement operation?

[161] A. Fifth.

Q. Were you subsequently bailed?

A. Take the fifth.

Q. By Mr. Pratt or relatives of his assisting you by giving your girlfriend five thousand dollars to bail you out?

A. I take the fifth amendment.

Q. Was that part of a plan of yours to request the five thousand dollars to ask Mr. Pratt so that you could entice him into an operation with Officer Dunn or others of the Holyoke Police Department that you knew were interested in arresting Mr. Pratt because he had been involved in an altercation with a state trooper?

A. Take the fifth amendment.

Q. Sir, did you on January 3, 1989, did you have an occasion to be introduced by Detective Dunn to several officers of the District Attorney's Office in Hampshire County?

A. I take the fifth amendment.

Q. Did you make a tape recording at their request of background material that you told them about of Mr. Pratt on January 3?

[163] A. I take the fifth amendment.

Q. Did you have contact with these Officers, were you then referred by an officer at the District Attorney's office, Judd Carhart, after you received five thousand dollars were you referred to the Federal Drug Task Force?

A. Take the fifth amendment.

Q. Did you participate in some tapes of telephone calls starting January 10, 1989 in an effort to get Mr. Pratt to buy some drugs from a federal agent?

A. Fifth amendment.

Q. Did you tell federal agents and state agents who referred you to the federal agent that Mr. Pratt was not too bright, you called him Pinhead and that you could easily get him to do this?

A. Take the fifth.

Q. Did you enter into a deal with the Massachusetts Police Department, Northampton Crime Prevention Unit, CPAC a unit of the State Police and Officer Dunn and an officer of Judd Carhart's office, the District Attorney in Hampshire County where they were going to assist you in crimes that **[163]**

were pending that you had pending in the Superior Court?

If you in fact assisted them in getting a drug deal going where Pratt would be arrested?

A. Take the fifth.

Q. Did you file this affidavit in the Superior Court partially with the idea in mind that there was an interference by them with you without the benefit of your counsel?

A. Take the fifth amendment.

Q. Did you file this affidavit because your name became public and law enforcement personnel promised and assured you along with five thousand dollars you were paid that your cooperation would remain confidential?

A. Take the fifth amendment.

Q. There are in fact five tapes of telephone calls buddy tapes in this case. Have you in fact heard these tapes that you participated in?

A. Take the fifth amendment.

Q. Did you in fact have several meetings with the unit called CPAC unit of the Massachusetts State Police as well as the DEA the Drug Enforcement **[164]** Association of the United States government?

A. Take the fifth.

Q. Okay.

THE COURT: Is there any sense, Mr. Troy, of going on with this?

MR. TROY: I am almost near the end, your Honor. I appreciate your patience.

THE COURT: It's all right.

Q. (By Mr. Troy) Did you later learn after cooperation with one Trooper Stevens that if Pratt was not arrested that would not in anyway inhibit the State Police or the District Attorney's office from incarcerating you despite your cooperation?

A. Take the fifth.

Q. The first night that you said to Detective Stevens that you would, sir you have to listen to my question!

A. I am listening to you.

Q. Did you in fact tell them that, strike that.

Were you in fact asked to participate in a controlled purchase of some cocaine in Northampton that night?

[165] A. Take the fifth.

Q. Did you tell them you were only interested in participating so that you could in fact testify if necessary or in the alternative not testify, you could assist them in entraping one Pratt into performing a deal with them?

A. I take the fifth.

Q. Did you in fact assist them in entraping one Pratt?

MR. KINDER: Your Honor, I object to the form of that question. It calls for a —

THE COURT: (Interposing) I sustain the objection.

Q. (By Mr. Troy) Have you been a confidential informant in the past for a federal government?

MR. KINDER: Objection, relevance, your Honor.

THE COURT: Sustained. Let me see if I could sum up. Do I understand correctly Mr. Wheeler that on advise of counsel that any questions pertaining to the government prosecution against James L. Pratt in which you may have had a part will **[166]** result in you taking the fifth amendment, refusing to incriminate yourself?

THE WITNESS: Yes.

THE COURT: All right. You may step down. You're excused.

For the record before you do go I want you to note the defense has moved to have me move to immunize Mr. Wheeler from testimony. The government has refused to join in such a request and on the law as I see it I am without authority to do such a thing. I refuse to immunize your client.

MR. SCHLANG: Thank you.

MR. TROY: Would you ask him not to leave the building until I am through talking to the court, if I am to argue to the court in hopes that it will change its opinion.

THE COURT: That I will change my opinion? You're free to go, I will not change my opinion.

MR. TROY: May I be heard for the record?

Thank you very much I appreciate that.

MR. TROY: Your Honor, I say there **[167]** has been a waiver of any privilege he has in connection with this case in so far as the federal case alone is concerned. That he participated in this investigation in the taping of my client and that I have no right of cross examination of him and since he participated in these conversations, he has waived his right. He is on tape and I can't cross examine the tapes. I am entitled to his testimony. If he continues to persist, if he continues to persist in taking the fifth amendment as to these issues, and nothing else in the world, these issues, then I suggest to you that you should rule that I have a right to have the testimony that he testified to by the playing of that tape. If he doesn't, you should incarcerate him.

Now following that then, if you deny that your Honor, I respectfully suggest to you that I make a motion to strike the tapes themselves and any testimony related thereto, and cite the following reasons. One, I can't cross examine the tapes. I can't get cross examination of him. I have taken every step possible to do so. I say that in doing so, making the motion to strike, you must also **[168]** strike the testimony given by Officer Rodriguez or anyone else in connection with those tapes for this reason.

These tapes were audited by the witness. Therefore, the testimony of the tapes are stricken then the testimony relating to them is also stricken. I respectfully move you do any or all of those things.

THE COURT: Government wish to make any comment?

MR. KINDER: Just briefly, the fact that he has a pending state case compelling him to take the fifth. The fact that on January tenth he made certain statements to the government is not in fact a waiver of that right, so I think the premise is incorrect.

THE COURT: Does the government still comment that if in fact the testimony was forthcoming you would inculpate rather than exculpate.

MR. KINDER: Your Honor, we have a tape recording of what Mr. Wheeler had to say. It certainly inculpates him completely.

[169] THE COURT: All right.

MR. MAGUIRE: I would like to be heard on this, your Honor.

THE COURT: Your client is not involved on this.

MR. MAGUIRE: I plan to join on this motion.

THE COURT: Joint motions are heard, they are denied.

MR. MAGUIRE: If I may, your Honor. On the issue to which the extent of those tape records and the transcripts are exculpatory, I would suggest to your Honor that they talk in great detail about Mr. Wheeler's knowledge of Mr. Pratt's activities. And Mr. Wheeler proclaims as I understand statements that he knows a great deal about Mr. Pratt's activities including where he gets his stuff, etc. Who distributes it for him. He was asked about those specific issues. He never mentioned Mr. Noble's name. Therefore, that is a very important part of my defense.

THE COURT: That's argument.

MR. MAGUIRE: In joining my motion, I

. . . . . .

[7]

you right now. Instead I will meet you in twenty minutes, that doesn't show a lack of predisposition. On the contrary, we have been hearing about the facts that he is addicted which is slightly inconsistent with a lack of predisposition in the case. I don't think there is either question.

THE COURT: Well, I am going to stand with my original ruling. You're on the record and you're protected here but I still find that I have found no improper government inducement by agents. I certainly haven't found any lack of predisposition on the part of the defendant so I am not going to instruct the jury.

MR. TROY: Quite briefly your Honor, I am not sure there has to be improper inducement. We have it here that his testimony that five thousand dollars came from the state and the state can't engage in misconduct, toss the case over to the federal government. I suggest the clean hand doctrine almost comes into play. In effect, if the state was engaged in misconduct, the federal government has to take that along with the case that [8] we suggested.

THE COURT: I don't find any. I don't find any evidence the five thousand dollars was part of the twelve thousand five hundred that was eventually found in the back seat of the car.

MR. TROY: That doesn't make any difference as far as we are concerned.

THE COURT: My ruling will stand. Are you going to put any witnesses on?

MR. TROY: We figure we would do the two doctors. They showed up anyway. I want to put them on, read in the offer of proof. As I understand you're not going to allow them to testify —

THE COURT: Now without the — now without the jury.

MR. TROY: Sure and then there are two witnesses that I would have. One of them is a Sergeant Mark McDonald to show that on January sixth my client was in an automobile fire. That they said a fire department came, the police department came, and they had to extract him from the car, that he was intoxicated and he cut his hand, smoke

. . . . . .

APPENDIX C

United States District Court
for the District of Massachusetts

C.A. # 89-30003

UNITED STATES OF AMERICA,

vs.

JAMES L. PRATT,

FINDINGS OF THE COURT AT DISPOSITION HELD BEFORE FREEDMAN, CDJ, AT THE US DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, SPRINGFIELD, MASSACHUSETTS, ON SEPTEMBER 26, 1989, COMMENCING AT 10:00 A.M.

APPEARANCES:
C. JEFFREY KINDER, ASSISTANT US ATTORNEY,
representing the United States

TROY & BACCARI,
representing the Defendant.
BY: JOHN A. BACCARI, ESQUIRE

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[2]

THE COURT: All right. Defendant is present with counsel for disposition. Before we get to that, defendant has filed a motion for a judgment of acquittal and a motion for a new trial. This came in this morning, and the government has not yet filed objection or response, but I have read them and I see no reason to do anything but deny them. I am satisfied with the results of the verdict. I am satisfied with what went on and everything is subject to appeal, of course, if the defendant wishes to appeal. Motion for new trial and/or motion for judgment of acquittal are both denied.

MR. BACCARI: I have apologized to Mr. Kinder. This is Mr. Troy's first day back to work since he was last working with this court on July 31. I welcome him back. During that time, your Honor, briefly I had to do my own work as well as Mr. Troy's. I had hoped on doing those memorandums sometime ago. Ultimately I did them Saturday. I faxed it to Mr. Kinder. I apologize to the court and to Mr. Kinder for delaying in getting them in. I also apologize, I filed the sentencing [3] memorandum this morning. That was written yesterday up until the early evening. I gave that to Mr. Kinder this morning.

THE COURT: I read that as well, thank you.

All right. This is under guidelines, and as I understand it, the defendant agrees with the twenty-six points but does not agree with the career defendant.

MR. BACCARI: That's correct, your Honor. More specifically, the base offense level as well as the total offense level is twenty-six with a criminal history category of five. We strenuously object to the career offender provision under Section 4(b)1.1 of the guidelines applies, and I have . . .

THE COURT: (Interposing) Well, why don't you put on the record why you think it does not apply.

MR. BACCARI: If I may your Honor, the pre-sentence report rests on three separate convictions or actually two separate convictions that appear in paragraph forty-one and forty-three [4] of the original pre-sentence report. In an addendum, the pre-sentence report states that the crime of assault and battery on a civilian as shown in paragraph thirty-nine of the pre-sentence report also would serve as a predicate to Section 4(b)1.1.

If I may your Honor, the two of them are assault and battery on a police officer. I have appended the pleading, the complaint, the application for complaint and the so-called addendum to my sentencing memorandum and in it it shows that Mr. Pratt was convicted for two counts of assault and battery on one Michael Sullivan and one Kevin A-N-H-T-O-N-O-V-I-T-C-H. Two other counts were dismissed at the request of the Commonwealth. The allegation with respect to Officer Sullivan is that he and Mr. Pratt crashed heads and with respect to Mr. Anhtonovitch that while in a cellblock area wherein behind bars Mr. Pratt spat upon Officer Anhtonovitch striking him about his head area.

There is an earlier assault and battery on a police officer. In that case, Mr. Pratt was involved in an automobile accident and is termed a serious automobile accident in the pre-sentence [5] report. He apparently was about the area of the accident scene when a police officer came upon the scene and inquired as to the nature and circumstances surrounding this accident. Mr. Pratt supposedly swung at this officer. Later on Mr. Pratt kicked this officer in the stomach area. He received thirty days in the House of Correction on that incident.

On the other incident involving Anhtonovitch and Sullivan, suspended sentence when House of Correction sentence was imposed and there is a civilian involved in this matter. And the individual's name in that was Ralph, if the court would bear with me, please.

THE COURT: Okay.

MR. BACCARI: Ralph O-L-S-Z-E-W-S-K-I. This was an incident that occurred on February 4 of 1983, your Honor. Also the sentence report indicates that on that very same day Mr. Pratt was treated at the Cooley Dickinson Hospital for contusions to the scalp, ribs and a fractured left elbow. It could be inferred that Mr. Pratt was a victim of assault and battery that day **[6]** and I would just say for the record, your Honor, that this incident occurred at the Seven O's which is a drinking establishment located on Route 116 in the Town of Sunderland. For that, Mr. Pratt received a fine of one hundred dollars.

So those are the three crimes that we have here, your Honor, that the probation report visa via this court finds it sufficient enough to invoke the career offender provision.

If I may your Honor, I would suggest to you the definition well covers three crimes. However, the definition is so di-minumus it would also include crimes against properties such as breaking an automobile window, or even perhaps chopping down your neighbor's tree. If you could chop down two of your neighbor's trees under these guidelines, apparently it would catapult you into this career.

THE COURT: As I read the guidelines definition it states, I think it's rather specific, all it calls for is a crime of violence which may call for a sentence exceeding two and a half years or up to two and a half years or better and the actual disposition does not come into play.

[7] MR. BACCARI: I understand that your Honor. What we have here are three state misdemeanors, maximum two and a half years in the house of correction. What I think is interesting is when one compares the definition of what a violent felony is to the commentary it is an absolute world of difference.

The commentary lists serious felonies that call either for the death penalty in some jurisdictions or in Massachusetts for life

imprisonment or certainly any upwards minimum of ten years at Walpole. And if I may your Honor, the commentary lists these crimes as murder, manslaughter, kidnapping, aggravated assault, extortion, forceable sex offense, arson or robbery are covered by this provision. Also added by enactment the crime of burglary of a dwelling which will be included under the commentary as of November first of this year unless there is legislation to strike that.

Now this is a case of first impression. I have researched this thoroughly. I have found no cases on this particular issue. There are a couple **[8]** of cases on the counterparts to this career offender namely deriving substantial income from crime. There is some case law on that. All we have here is basically United States vs. Patterson. That was Judge Wolf's case wherein Judge Wolf held that General Law Chapter 266, Sections 16 and 18 which are breaking and entering dwelling house crimes did not qualify for crimes of violence. The first circuit, as we are aware, reversed Judge Wolf. Those specific two statutes respectively carry a twenty year Walpole sentence and a ten year Walpole sentence and the court stated that they did qualify for the simple fact that the burglary of a house possesses the potential for a serious violent outbreak.

Reminds me of knock and announce statute your Honor, I believe it's Section 310. The same underlying theory is that when someone breaks into a house in the night time that it can be expected an individual who owns that house or resides in that house is going to respond with violence, it's a serious felony. So serious burglary in this state is a life felony. I think all the crimes enunciated **[9]** in the commentary, and it's important your Honor again getting back to the commentary, again it is murder, manslaughter, kidnapping, etc., or robbery. That ends it. Those are the crimes that they are talking about.

Again, they are all serious felonies. There isn't a felony there that is less than a ten year state prison sentence. The

extortion, extension of credit is a federal offense. Likewise, is a state offense and my memory is it is a ten year sentence. Burglary, maybe twenty, or it's life. Robbery is a life felony in Massachusetts. And I think your Honor, if Congress intended these misdemeanors these assault and batteries on the police officer, spitting on a police officer, smashing heads with a police officer, kicking a policeman and assault and battery on a civilian in a barroom, if they meant that, they should have put it down in the commentary and they didn't.

I don't think when you look at the facts of this case when you look, it's replete in the report that Mr. Pratt is a long-time abuser of alcohol. I suggest to you that alcohol played a part in all of these three assault and batteries and I don't think it's right to catapult him into this career offender, which you take two of those assault and batteries, it's going to jump him from nine years two months minimum up to twenty one years ten months. I don't think anybody intended that to happen when you have such diminumus, your Honor, like crime.

THE COURT: Mr. Kinder.

MR. KINDER: Your Honor, I have to conclude that the Sentencing Commission anticipated these kinds of disputes with regard to the career offender provision because they were very specific not only in the law but also in the commentary as to specifically what kind of offense is the proper predicate offense for the career offender provision. To suggest that Congress didn't mean exactly what it said which I interpret them to be arguing, it's just ridiculous in this case. I want to read the definition just because I think it's important.

They have emphasized the fact that in the commentary there are certain examples listed. [11] However, that is not an exclusive list. They are very clear any other crime which meets the definition under 18 United States code 16 does in fact qualify as a predicate offense. That definition is any offense that has an

element, the use, attempted use or threatened use of physical force against the person or properties of another or any other offense that is a felony and by its nature involves a substantial risk that physical force against the person or properties of another may be used in committing the offense. The first circuit has already spoken, not to this direct issue but certainly on the issue of whether or not breaking and entering is a crime of violence. When you compare breaking and entering to a physical attack on a police officer which is what we have in this case, I don't think there is any question about how the first circuit would interpret that. The fact as defense counsel points out, those are not diminumus offenses which is not really an issue for this court to determine. The question is, do these crimes meet the very specific definition set out in the commentary. I don't think there is any question **[12]** that they do. Therefore it's our position that there is no reasonable dispute over whether or not these particular crimes are violent offenses. And the court has no choice but to impose the career offender category.

THE COURT: Mr. Baccari?

MR. BACCARI: Again your Honor, I think there is a conflict between the definition section and the commentary. Obviously they shouldn't be a conflict. This new waters as far as the parties and court are concerned here. The definition would support a career offender for two assaults upon properties. George Washington cut down two cherry trees. If he was around today his next offense would be in the career offender range. I don't think anyone intended that.

THE COURT: Well I don't look lightly on this situation. I recognize it's something that perhaps the first circuit has not dealt with. It may be something new to the United States Sentencing Commission as well when they get all the cases in and compile and put them all together and see what the end result is. I can't help but feel that **[13]** crimes of violence that

have been mentioned both in the guidelines and the commentary clearly come into play in this particular situation. I can't believe that assault on police officers, assault and batteries on citizens or whatever cannot be regarded as predicate crimes of violence. I think they have to be regarded as such. And I find here the various offenses to which this defendant has been found guilty as well as those still pending which I look at but don't give much weight to, puts him directly into the career sentencing section of the guidelines law and I so hold.

Now, does the Government have a recommendation on this case?

MR. KINDER: Yes, your Honor. If I could have just a moment.

Your Honor, in the defendant's sentencing memorandum he has asked the court to impose a sentence that is less than the established minimum of twenty one years and ten months. And he asked the court to do that based primarily on the evidence that was heard or presented in this case outside the presence of the jury by the two experts.

[14] That is first, that the defendant suffered from some sort of organic brain disfunction or had brain damage of some sort. And second, that he was addicted to alcohol.

The Sentencing Commission again specifically addresses the question of diminished capacity and departure and how the court ought to look at diminished capacity in making any decision as to whether any departure is appropriate.

In Section five K two point thirteen, if the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other, a lower sentence may be warranted to reflect the extent to which mental capacity contributed to the commission of the offense provided the defendant's criminal history does not indicate a need for incarceration to protect the public. That again is very specific language.

And the one thing that really stands out in this case when you read the pre-sentence report is the criminal history section. This is five pages, eighteen convictions, seven of those are **[15]** related to drug and alcohol abuse, five of those are assaults or assault and batteries. The one thing that has been true that has rung true and has been consistent in the last fourteen years of this criminal history is that this particular defendant makes a habit of abusing drugs and alcohol, getting into a vehicle, driving, being stopped and then attacking who it is that stops him. This person presents a very clear and present danger. There is absolutely nothing to suggest that when he is out on the street again he is not going to engage in exactly that same kind of behavior. Clearly, if any defendant presents a danger to the public if he is not incarcerated, Mr. Pratt is that person.

Your Honor, the one thing I think the court needs to note here is that a downward departure certainly isn't necessary in this case. Mr. Pratt has a long history of violating the law. He has a long history of putting others in danger and the one thing the sentencing guidelines don't reallty take into consideration in this case are the two cases the court has already alluded to.

There are two pending cases in state **[16]** court. One is for narcotic trafficking amounts of a kilo or greater and another is assault and battery on a police officer. Those cases are important because at the time of this offense, James Pratt was out on bond in those two state offenses. That is not factored into the sentencing guidelines calculation and it is something this court can certainly consider in making its determination about where in the range the sentence ought to fall.

In particular your Honor, the allegations in the assault and battery on a police officer are that this man was stopped again for drunk driving, that he made an attack on a police officer, a female state trooper, that he beat her up then he attempted to

run her over with his vehicle. Clearly there has been no finding of guilt on that case. It's important for this court to note I believe the seriousness of that offense and the fact shortly after posting bond on those two state offenses, James Pratt, while under the order of the court not to commit any offense, immediately contacted an informant to try and come up with a new source of cocaine. That demonstrates your Honor, that he has **[17]** absolutely no respect for the court, law enforcement or anyone else involved with the criminal justice system. As soon as he is out on the street something is going to happen, it's going to be more serious an attack of a police officer. It's remarkable in the last fourteen years something more serious — someone has not been killed.

MR. BACCARI: I object to that.

THE COURT: It's already in the pre-sentence report. I have seen that before. It may stand for whatever it's worth.

MR. KINDER: Your Honor, I would ask the court not to consider the argument for departure downward and in fact there was a substantial argument to be made on the basis of those two pending state cases that something less than the minimum is required. It's the government's position your Honor, that is a sentence of twenty five years incarceration is the appropriate sentence in this case plus the required period of supervised release and the fine provided for by the sentencing guideline.

MR. BACCARI: If I may your Honor. **[18]** There is no secret here Mr. Pratt's problems basically are resulting from an abuse of alcohol and narcotics. It's in the report that he has abused alcohol and narcotics for some thirteen years now since the time he was fourteen years old. He also shows a history of orthopedic injuries as well as head injuries.

Respectfully your Honor, I have to object to the finding that he is a career offender. By that finding we are now into the stratosphere range of twenty one years, ten months.

Your Honor, I was involved in a case a short while ago in Boston in front of Judge McNaught. There were several co-defendants. It was a drug conspiracy. The so-called kingpin was a fellow by the name Schmuel David. He was convicted of importing and distributing in excess of two hundred fifty kilo grams of cocaine. I think the philosophy behind these sentencing guidelines is that when a person with a similar background commits a similar offense whether that person be from Butte, Montana; Denver, Colorado; New Orleans, Louisiana or Springfield is that that person, all those people **[19]** will be treated similarly. And I think when you put up a guy by the name of Schmuel David who got I believe twenty five or thirty years, the same the government is asking for here, and you put him up against James Pratt, you heard the evidence the first day. There is a contact made with Officer Rodriguez. Mr. Pratt shows up with five thousand dollars, he is surprised when Officer Rodriguez tells him I don't break my packages, man, it's a kilo or more. Obviously there was a conversation with Wheeler ahead of time. Mr. Pratt shows up, according to the tapes, to purchase five thousand dollars worth of cocaine which I suggest to you is less than five hundred grams. Then there is talk about I'll pledge a red IROC that has no mortgage on it. I will give you six thousand dollars. We finally end up with twelve thousand five hundred, that's seized on the eighteenth of January.

Your Honor I think that's ludicrous for the government to ask for twenty-five when you put those, I just use Schmuel David as an example. A fellow that brought in, distributed more than two hundred fifty kilograms of cocaine. Here we don't **[20]** have any drugs, was a mock sale. There were no narcotics. You put these two people side by side, one a multi-millionaire as a result of this dreadful trade in white powder, and Mr. Pratt who has difficulty coming up with relatively miniscule amounts of money.

Based on the evidence that you heard from the two experts that we produced your Honor, I have to ask the court to departs from the guidelines in light of this career offender. The government suggests that we need a specific deterrent here. I suggest that twenty five years certainly isn't needed to dry out Mr. Pratt. He needs help. Maybe hopefully he is going to do some time. Maybe he can eventually make it down to I understand Lewisburg, Kentucky, one of the federal facilities in Kentucky might have the help that he needs. But twenty five years isn't necessary. I think it breeds disrespect for the law your Honor, on the facts of this case. And if I may have one moment.

THE COURT: Surely.

MR. BACCARI: When I came here this morning your Honor, Mr. Troy and myself made up our **[21]** minds on what we were going to ask this court. We were hoping that the court would not find the predicate career offender had been met. We are going to ask for the same sentence that we were going to before. I ask that you impose a sentence of six years.

THE COURT: Very well, Mr. Pratt you have the opportunity of speaking in your own behalf.

MR. PRATT: I have nothing to say.

THE COURT: Very well, Just a moment.

(discussion held off the record).

THE COURT: I understand from Mrs. Bov:.an, the defendant you were referring to a moment ago Mr. Baccari had a thirty year sentence and he was not a career defendant. He would have had a life sentence.

MR. BACCARI: With my understanding it was thirty. It was twenty-five or thirty. He fits squarely —

THE COURT: (Interposing) I am just mentioning that.

Mr. Pratt would you stand, please. I **[22]** stated a couple moments ago that this court does not consider lightly the sentence it has to impose. It takes a very serious one.

When I see a young person before me and recognize that he is going to be sentenced to prison regardless of how long it may be, this court literally squirms at the thought it has to do so. But the court has a job to do. And the court has to do what the law says it should do.

I have found you to be a predicate career defendant under the guidelines definition and the law as now expressed. For your benefit I will have you know that many judges throughout the United States regard the guidelines provisions as unconstitutional for one reason or another. And this went to the United States Supreme Court and the United States Supreme Court upheld the constitutionality of the United States Sentencing Commission and promulgated the guidelines law so it is the law of the land. And it must stand and judges throughout the nation are sworen to try to uphold it and try to make it consistent as best they can throughout the fifty states of the United **[23]** States.

The guidelines range, because of what I have found, calls for either a two hundred sixty-two to three hundred twenty-seven month range of sentencing in this particular capacity that I now have to uphold.

I would look with kindness upon the departure if I could literally find some reason to do so. I cannot. The situation that has taken place here has shown that you have assaulted persons for years. You show no remorse for your past criminal misbehavior, and you apparently have never learned from your previous mistakes. And it seems to me the career offender provision of the guidelines appears to be designed specifically for a person such as what you have done in your past history.

I find no evidence that you were coerced or that you were acting under duress. Therefore, I can find no reason to depart from the guidelines. I am however, going to sentence you to the minimum sentence that I can express under the guidelines as I still hope that with your youth and the fact that **[24]** you will

be on the street one day that perhaps you will learn from your past mistakes and can still become a useful citizen.

I also agree with Mr. Baccari that I would like to see you institutionalized in a location where you can receive help if you need same and if you desire same. And I will have no objection to an institution of that kind that I could recommend for that kind of purpose.

I find no assets or financial background that you have that indicates that a fine or restitution is called for. And therefore, I am going to order that you be committed into the custody of the Attorney General as lawful representative for a period of two hundred sixty-two months which comes to twenty-one point six years plus four years supervised release following imprisonment.

THE CLERK: The Court has ordered that you be committed in the custody of the Attorney General for further —

THE COURT: Let me also say something John before you get that far. To inform you that **[25]** you were convicted by a jury in this court. As I stated before, I find no reason to change that decision. You have the right of appeal. If you can afford counsel of your own choosing, counsel will know how to file a notice of appeal in your behalf. If you're what is called indigent, financially unable to provide counsel of your choice, then this court can appoint counsel for purposes of this appeal and can order the Clerk of this court to file notice of appeal thereby protecting your rights.

Under the statute by act of Congress a fifty dollar special assessment fee must be paid to the Clerk of this office and in turn to the Department of Justice and that can be done at your disposal as soon as you can afford it.

THE CLERK: Once again the court has ordered that you be incarcerated for two hundred sixty-two months. The court orders a period of supervised release of four years, and fifty dollar special assessment fee to be paid to the Clerk's office as soon as you can afford it.

MR. BACCARI: Judge, small housekeeping matter. I wonder if I could inquire of **[26]** the court. The court is aware that there is pending state charges. I was wondering if there was some type of order to keep him —

THE COURT: (Interposing) Keep him locally until such time?

MR. BACCARI: Yes, Your Honor. If he could stay in Northampton, the trial of the state case will be in Northampton.

THE COURT: That will be up to the Marshall Service and Department of Prisons, but I have no objection.

MR. BACCARI: All right.

(Court adjourned)

. . . . . .

CERTIFICATION

I, SHIRLEY A. WHALEN, Certified Shorthand Reporter, hereby certify that the foregoing is a true and accurate transcription of my stenographic notes to the best of my knowledge and ability.

/s/ _____
SHIRLEY A. WHALEN

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. CRIMINAL NO. 89-30003-01

JAMES L. PRATT, JR.
Defendant

MEMORANDUM OF SENTENCING HEARING AND REPORT OF STATEMENT OF REASONS

Freedman, D.J.

Counsel and the defendant were present for sentencing hearing on September 26, 1989. The matters set forth were reviewed and considered. The reasons for sentence pursuant to Title 18 U.S.C. § 3553(c), as set forth herein, were stated in open court:

1. Was the presentence investigation report (PSI) reviewed by counsel and defendant including any additional materials received concerning sentencing? _✓_ Yes __ No
2.(a) Was information withheld pursuant to FRCrP 32(c)(3)(A)? __ Yes _✓_ No
   (b) If yes to (a), has summary been provided by the court pursuant to FRCrP 32(c)(3)(B)? __ Yes __ No
3.(a) Were all factual statements contained in the PSI adopted without objection? _✓_ Yes __ No

(b) If no to (a) the PSI was adopted in part with the exception of the following factual issues in dispute:

(c) Disputed issues have been resolved as follows after ___ evidentiary hearing, ___ further submissions and/or ___ arguments:

4.(a) Are any legal issues in dispute? _✓_ Yes __No

If yes, describe disputed issues and their resolution:

The only real objection was the Court's finding that the defendant's past criminal history made him fall within the career defendant provision.

5.(a) Is there any dispute as to guideline applications (such as offense level, criminal history category, fine or restitution) as stated in the PSI? _✓_ Yes __No

If yes, describe disputed areas and their resolution:

See above as to career defendant provision.

(b) Tentative findings as to applicable guidelines are:

Total Offense Level: 34
Criminal History Category: VI
262 to 327 months imprisonment
3 to 5 years supervised release
$17500.00 to $2,000,000 fine (plus $11,261 per yr.
cost of imprisonment/supervision)
$ n.r. restitution
$ 50.00 special assessment ($____ on each of
counts)

6.(a) Are there any legal obligations to tentative findings? _✓_ Yes __No

(b) If no, findings are adopted by the Court.

(c) If yes, describe objections and how they were addressed:

Argument was expressed by counsel that career defendant provision does not apply. The court ruled that it did so apply.

OR sentence hearing is continued to_____ __
to allow for preparation of oral argument or filing of written submissions by _____

7.(a) Remarks by counsel for defendant.* _✓_ Yes __No
(b) Defendant speaks on own behalf. __Yes _✓_ No
(c) Remarks by counsel for government. _✓_ Yes __No

8. The sentence will be imposed in accordance with the prescribed forms in Bench Book Sec. 5.02 as follows:

262 months imprisonment
months/intermittent community confinement
months probation
4 yrs. supervised release
$ 0 fine (including cost of imprisonment/supervision)
$ 0 restitution
$ 50.00 special assessment ($ on each of counts)

Other provisions of sentence: (community service, forfeiture, etc.)

none

9. Statement of reasons for imposing sentence. Check appropriate space:

(a) ___ Sentence is within the guideline range and that range does not exceed 24 months and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR _✓_ Sentence is within the guideline range and that range exceeds 24 months and the reasons for imposing the selected sentence are:

Assaultive record of defendant without any signs of remorse warranted the sentence imposed but because of his youth, the Court complied the lower end of the guideline range.

*The order of argument and/or recommendations and allocution may be altered to accord with the Court's practice.

(b) ___Sentence departs from the guideline range as a result of ___ substantial cooperation upon motion of the government

OR

___ a finding that the following (aggravating or mitigating) circumstance exists that is of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that this circumstance should result in a sentence different from that described by the guidelines for the following reasons:

(c) ___Is restitution applicable in this case? ___Yes _✓_No

Is full restitution imposed? ___Yes ___No

If no, less than full restitution is imposed for the following reasons:

(d)___ Is a fine applilcable in this case? _✓_Yes ___No

Is the fine within the guidelines imposed? ___Yes ___No

If no, the fine is not within guidelines or no fine is imposed for the following reasons:

_✓_ Defendant is not able, and even with the use of a reasonable installment schedule is not likely to become able, to pay all or part of the required fine; or

___ Imposition of a fine would unduly burden the defendant's dependants; or

___ Other reasons as follows:

10. Was a plea agreement submitted in this case? ___Yes _✓_No

Check appropriate space:

___ The Court has accepted a Rule 11(e)(1)(A) charge agreement because it is satisfied that the agreement adequately reflects seriousness of the actual offense behavior and accepting the plea agreement will not undermine the statutory purposes of sentencing.

___The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that is within the applicable guideline range.

___The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that departs from the applicable guideline range because the Court is satisfied that such a departure is authorized bby 18 U.S.C. § 3553(b).

11. Suggestions for guideline revisions resulting from this case are submitted by an attachment to this report.

__Yes _✓_No

12. The PSI is adopted as part of the record, either in whole or in part as discussed above and is to be maintained by the U.S. Probation Department under seal unless required for appeal.
13. Judgment will be prepared by the clerk in accordance with above.
14. The clerk will provide this Memorandum of Sentencing Hearing And Report of Statement of Reasons to the U.S. Probation Department for forwarding to the Sentencing Commission, and if the above sentence includes a term of imprisonment, to the Bureau of Prisons.

9-26-89

/s/ _____
Frank H. Freedman
UNITED STATES DISTRICT JUDGE